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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KRISTINA ENNIX SLAUGHTER and MITCHELL SLAUGHTER,

Plaintiffs,

vs.

CITY OF EMERYVILLE, EMERYVILLE POLICE DEPARTMENT, E. WHITE (#307) and S. ANDRETICH (#339), individually and in their official capacities; VICTORIA'S SECRET, CLAUDIA SOTO, ABERCROMBIE & FITCH, and MELISSA BASFIELD,

Defendants.

Case No. C08-01552 PJH

Hon. Phyllis J. Hamilton

[Fed. R. Civ. Proc. 12(b)(6), 12(e)]

DEFENDANTS VICTORIA'S SECRET STORES, LLC AND CLAUDIA SOTO'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

Date: June 18, 2008
Time: 9:00 a.m.
Courtroom: 3, 17th Floor

Action Filed: March 20, 2008
Trial Date: None Set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

California Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

California Statutes

I. INTRODUCTION

Plaintiffs Kristina and Mitchell Slaughter's ("Plaintiffs") Opposition ("Opp.") to Victoria's Secret Stores ("VSS") and Claudia Soto's ("Soto", VSS and Soto referred to collectively as "Defendants") Motion to Dismiss/Motion for More Definite Statement ("Motion") relies heavily on the general "notice pleading" rules to save their woefully deficient Complaint. Plaintiffs utterly fail to allege or make an offer of proof as to facts substantiating their claim that Defendants engaged in any "joint action" with any state actor that would expose Defendants to liability under 42 U.S.C. § 1983 ("§ 1983"). Plaintiffs further concede that VSS is a private employer and therefore not subject to Government Code § 815.2 of the California Tort Claims Act, but curiously argue, without any authority, that Defendants could be held liable under a *respondeat superior* theory that is divorced from any statutory or common law moorings. Plaintiffs acknowledge that Defendants have not engaged in any acts or threats of intimidation or coercion against them, but purport to ensnarl Defendants in a web of extenuated liability based on the actions of others. Plaintiffs' claim for intentional infliction of emotional distress fails because Plaintiffs have not, and cannot, allege any extreme or outrageous conduct. Plaintiffs assert no facts that Defendants invaded any zone of privacy to which they had a reasonable expectation of privacy. Plaintiffs offer no facts that Defendants' conduct proximately caused their injuries to substantiate their negligence claim, since they expressly allege that Defendants, allegedly erroneously, relied on information given to them by another eyewitness. Plaintiffs' common law tort claims (for intentional infliction of emotional distress, invasion of privacy, and negligence/negligence per se) are barred by the absolute privilege for communications made "in any other official proceeding authorized by law" under California Civil Code § 47(b). For all of these reasons, Plaintiffs' claims against Defendants should be dismissed with prejudice.

II. ARGUMENT

A. Plaintiffs Concede Their Tenth Cause of Action for Slander Per Se Should Be Dismissed.

Plaintiffs concede that, under the Uniform Single Publication Act, their Tenth Cause of Action for slander per se under California Civil Code § 46 should be dismissed against VSS and

Soto. (Opp., 1 at fn. 1 & 10:21-26).

B. Plaintiffs Concede that VSS and Soto Are Not Government Entities and That Government Code § 815.2 Does Not Apply to Defendants, Warranting Dismissal of Their Fifth Cause of Action.

Plaintiffs concede that VSS is not a public entity, and hence, cannot be liable under Government Code § 815.2. (Opp., 5:12-13). Plaintiffs argue, however, that they have alleged a "respondeat superior" theory of liability in their Fifth Cause of Action that would save them from dismissal of this claim. Plaintiffs offer no authority, nor are Defendants aware of any, that would allow Plaintiffs to allege a cause of action on the basis of *respondeat superior* that stands alone, i.e., without the underlying mooring to a statutory or common law violation. Plaintiffs' Fifth Cause of Action therefore should be dismissed with prejudice.

C. Plaintiffs Fail to Allege Facts Sufficient To Constitute "Joint Action" For Purposes of § 1983 Liability In Their First and Third Causes of Action.

Plaintiffs do not dispute that, to be liable under § 1983, Plaintiffs must allege facts to show that VSS and Soto acted under color of state law. *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). Private parties may be held liable for § 1983 violations under a "joint action" theory where there is an alleged conspiracy between the state actor and private citizen, or where there is a "substantial degree of cooperative action" between the two. *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989). Here, there are no allegations of a conspiracy to deprive Plaintiffs of their constitutional rights since, by Plaintiffs' own allegations, Soto absolved Plaintiffs of any involvement in the shoplifting incident in the line-up and procured their immediate release. (Complaint, ¶ 34). The question is whether Soto's (and vicariously VSS') actions of calling the police to report a crime and providing details of the suspects constitute a "substantial degree of cooperative action" constituting action "under color of state law."

Plaintiffs assert that paragraphs 18, 37 and 45 of their Complaint sufficiently allege facts constituting "joint action" between the Emeryville Police Department and VSS such that VSS could be held liable as a "state actor" under § 1983. (Opp., 4:8-14). The Complaint only alleges, however, that VSS had prior incidents of theft, did not have surveillance cameras, did not employ

security personnel, and did not detain shoplifting suspects while the suspects were inside VSS stores but rather, notified law enforcement after the suspects had left the store. *See* Complaint, ¶ 37.[1] Boiled to its essence, Plaintiffs have alleged nothing more than the fact that VSS should be liable under § 1983 because it chose to call the police to detain criminal suspects instead of effecting citizen's arrests. That is the alleged "customary plan" upon which § 1983 liability is supposed to attach. None of the cases cited by Plaintiffs support their theory of liability.[2]

In *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 936 (1982), the Court held that a debtor could bring a lawsuit against a corporate creditor who relied on a state statute to secure the assistance of the county sheriff and court clerk to attach plaintiff's property without a hearing. There, the statutory scheme upon which the private creditor relied to effectuate prejudgment attachment based on an affidavit via an *ex parte* application was challenged as a violation of constitutional procedural due process. The test for "joint action" liability under § 1983 is (1) whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority; and (2) whether the private party may be appropriately characterized as "state actors." *Id.* at 939. Since a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" and the actions were taken pursuant to a state statute, both elements were met in *Lugar*. *Id.* at 941-42. The Court was careful to note that its rule should not be interpreted so broadly in other contexts, where a state's procedures to attach private property are not at issue. *Id.* at 942. The state actor requirement ensures that not all private parties "face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.* at 937. In contrast, this case presents no facts of any "state policy" or that Defendants are "state

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[1] Paragraphs 18 and 45 provide no factual allegations of any purported "joint action" between VSS and the Emeryville Police Department.

[2] *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) is inapposite in that there is no discussion of a private actor's potential liability under § 1983 as a result of alleged "joint action" with a state actor. The issue in that case was whether acknowledged state actors (San Diego County Sheriff and County Classification Committee) could be liable under § 1983 when they did not "personally participate" in the forfeiture of a prisoner's earnings by transferring him out of an "honor camp."

actors," and no facts of any substantial cooperative action between Defendants and the Emeryville Police Department. Defendants did not cloak themselves with the authority of the state to carry out allegedly unconstitutional actions. *See Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 510-13 (5th Cir. 1980) (a single request for the police to perform peacekeeping functions may not be sufficient to make a landlord a "joint actor" with the state for § 1983 purposes).

Dennis v. Sparks, 449 U.S. 24, 28 (1980) involved allegations that private actors conspired to bribe a judge to obtain an injunction, thereby satisfying the "action under color of state law" requirement because an official act of a judge was allegedly the product of a corrupt conspiracy involving bribery of the judge. Again, there are no allegations here of a conspiracy between Defendants and any state actors who acted in concert to deprive Plaintiffs of their constitutional rights.

In *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558 (8th Cir. 1989), the Court noted that Wal-Mart employees detained plaintiff, conducted a thorough search of her body (which revealed no stolen items), and still proceeded to call the police to arrest plaintiff and thereafter prosecute her. One of the employees, a store security guard, who detained plaintiff was also an employee of the police department and worked closely with the prosecuting attorney, who decided to prosecute based solely on such employee's recommendation. Under those facts, the Court held that plaintiff could assert a § 1983 claim because the employees acted in concert with the police to deprive a person's civil rights. *Id.* at 559. None of the facts in *Murray* are present here. Indeed, Plaintiffs allege that Defendants should have, but did not, employ private security guards and permit employees to detain suspected shoplifters. (Complaint, ¶ 37).

Plaintiffs weakly attempt to distinguish *Collins v. Womancare*, 878 F.2d 1145, 1155 (9th Cir. 1989), a case that squarely rejects Plaintiffs' theory of liability, by arguing *Collins* involved different facts and procedural background. (Opp., 4:15-5:8). Plaintiffs argue that the police in *Collins* "maintained a policy of neutrality and conducted an independent investigation whereas, here, the police did not." *Id.* at 4:19-20. Plaintiffs' own Complaint belies their claims in the Opposition that the police here failed to conduct an independent investigation. The Emeryville police officers detained Plaintiffs long enough to conduct a field line-up, summoned the

complaining party to identify the detained suspects, and thereafter released Plaintiffs when Soto informed the police they were not the suspected shoplifters. (Complaint, ¶ 34).[3] Plaintiffs abjectly fail to distinguish the corollary facts between *Collins* and here, where the Ninth Circuit in *Collins* long recognized that "merely complaining to the police does not convert a private party into a state actor." *Id.* at 1155. "Nor is execution by a private party of a sworn complaint which forms the basis of an arrest enough to convert the private party's acts into state action." *Id.* Plaintiffs have alleged nothing more than Defendants making a call to the police to report a crime. Plaintiffs have failed to allege, and indeed cannot allege, any set of facts consistent with their current Complaint that would show the state has "'so far insinuated itself into a position of interdependence with [Defendants] that it must be recognized as a joint participant in the challenged activity.'" *Id.* at 1155, *citing Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974). To charge a private party with state action under this standard, the governmental body and private party must be intertwined in a "symbiotic relationship." *Jackson,* 419 U.S. at 357. This "symbiotic relationship" must involve the alleged constitutional violation. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 547 n. 29 (1987). There is absolutely no authority supporting Plaintiffs' position that a private party's *failure* to apprehend criminals on their own rises to the level of state action such that Defendants' actions may be "fairly treated as that of the [Government] itself." *See Jackson*, 419 U.S. at 351. Plaintiffs' First and Third causes of action under § 1983 should be dismissed as a matter of law.

D. Plaintiffs' Eleventh Cause of Action Under the Bane Act Should Be Dismissed Because Plaintiffs Acknowledge that Defendants Did Not Engage In Any Threats, Intimidation or Coercion.

Plaintiffs allege that the detention and arrest form the factual basis supporting their claim for a violation of California Civil Code § 52.1(b) ("the Bane Act"). However, Plaintiffs acknowledge that it was the Emeryville Police Department that allegedly unlawfully detained and

[3] Plaintiffs' argument that this fact is "irrelevant," without any reasoning or authority, is entirely unpersuasive. (Opp., at 5 fn. 3). This fact is significant in that it shows Defendants and the Emeryville Police Department did not conspire or act in any joint fashion to deprive Plaintiffs of their constitutional rights.

arrested them, not Defendants. (Opp., 6:14-16). Plaintiffs argue that Defendants may be held liable under the Bane Act because they "acted jointly with the Emeryville Police Department pursuant to a customary plan . . .." (Opp., 6:15-20). Plaintiffs provide no authority for their assertion that liability under the Bane Act can be transmuted in the manner they suggest, where a person can be held liable for the actions of another under a "joint activity" theory. In *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 842-43 (2004), cited by Plaintiffs, the Court held that an intent to discriminate based on some protected characteristic is not required under the Bane Act. (Opp., 6:4-6). Defendants do not disagree. However, what is required by the statute and interpreting cases is that some attempt or threat, intimidation, or coercion is required.[4] Civ. Code § 52.1(a) & (b); *Austin B. v. Escondido Union Sch. Dist.*, 149 Cal.App.4th 860, 881-83 (2007); *Jones v. Kmart Corp.*, 17 Cal.4th 329, 334 (1998) ("But section 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion.")[5] Indeed, the Court of Appeal in *Venegas*, 153 Cal.App.4th 1230, 1247-48 (2007), after remand dismissed individual police officers who did not personally engage in any conduct that constituted threats, intimidation, or coercion against plaintiffs even though this claim remained viable against other officers who allegedly did engage in the challenged conduct.

Additionally, conduct that is absolutely privileged under California Civil Code § 47(b) (here, the reporting of a crime to the police) also bars an action based on the Bane Act. *Fenters v. Yosemite Chevron*, 2006 WL 2016536, *3, *17-18 (E.D. Cal. 2006) (claim for violation of California Civil Code § 52.1 for, among other things, false arrest and malicious prosecution dismissed because of absolute privilege under California Civil Code § 47(b)), *citing Hagberg v.*

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[4] Defendants do not disagree that a detention and arrest by law enforcement officers may form the basis of a Bane Act violation if conducted without probable cause (*see Cole v. Doe I thru 2 Officers of the City of Emeryville Police Dept.*, 387 F.Supp.2d 1084, 1103 (N.D. Cal. 2005). Again, however, Defendants VSS and Soto engaged in no such conduct here.

[5] Plaintiffs' attempt to distinguish *Jones* at footnote 4 of their Opposition is unpersuasive. As the language of *Jones* and the statute make clear, no state action is required so it is of no moment that the plaintiffs in *Jones* did not allege that the private actors acted under color of state law. 17 Cal.4th at 334. Moreover, while the plaintiffs in *Jones* limited the underlying statutory/constitutional violation supporting their Bane Act claim to unlawful searches and seizures, which the *Jones* Court held to be applicable only as against government actors, Plaintiffs' assertion of additional statutory/constitutional violations without any corresponding factual allegation beyond Plaintiffs' detention and arrest renders this case indistinguishable from *Jones*.

California Federal Bank, 32 Cal.4th 350, 360 (2004)).

Finally, Plaintiffs offer no authority or argument to contradict Defendants' contention that speech alone is insufficient to support a claim under the Bane Act unless the speech itself threatens violence against a specific person. Cal. Civ. Code § 52.1(j). Defendants are alleged to have called the police to report a theft and provided details regarding the suspects and their vehicles to the police. Defendants are not alleged to have taken any action against Plaintiffs, much less any action that could be fairly construed as intimidating, coercive, or violent. For these reasons, Plaintiffs' Eleventh Cause of Action should be dismissed with prejudice.

E. Plaintiffs' Twelfth Cause of Action under the Ralph Civil Rights Act Should Be Dismissed Because Defendants Did Not Engage In, Aid, or Incite A Violation Prohibited by Statute.

As with the Bane Act allegation, Plaintiffs do not dispute that Defendants did not engage in any threat or act of violence, intimidation or coercion on account of Plaintiffs' race in violation of California Civil Code § 51.7 (the "Ralph Civil Rights Act"). (Opp., 7:24-25: "Plaintiffs were subject to violence because they were detained and arrested at gun point by officers of the Emeryville Police Department."). Rather, Plaintiffs argue that Defendants "may be held liable under an agency theory because Defendant Soto was responsible for aiding in or inciting a violation of the statute." (Opp., 7:26-8:1).

First, there is no "agency" relationship between Soto and the Emeryville Police Department and hence, no "agency theory" of liability. Plaintiffs offer no cases discussing instances where a defendant is liable for "aiding, inciting, or conspiring" to violate the Ralph Civil Rights Act. Second, Plaintiffs' Complaint and Opposition to this Motion make clear that Soto did not "aid, incite, or conspire" in the violation of the Ralph Civil Rights Act. Plaintiffs acknowledge that "Defendant Soto . . . had no personal knowledge about Plaintiffs' involvement in the incident." (Complaint, ¶ 35; Opp., 8:3-5). Since a violation of the Ralph Civil Rights Act does require intentional discrimination, Soto's lack of personal knowledge of Plaintiffs' involvement cannot form the premise of an act of intentional discrimination. *See Ortland v. County of Tehama*, 939 F.Supp. 1465, 1470 (E.D. Cal. 1996) (claim must be premised on intentional act by the defendant).

Further, Plaintiffs allege and confirm in their Opposition that the provision of Plaintiffs' license plate number was based on information given to her by co-defendant Melissa Basfield ("Basfield"). (Complaint, ¶¶ 35-36; Opp., 8:5-7).

The express allegations in Plaintiffs' own Complaint make clear that: (1) Plaintiffs were not at the VSS store at the Bay Street Mall on the day of the incident (Complaint, ¶ 2); (2) Soto did not know Plaintiffs, had no personal knowledge of Plaintiffs' involvement in the shoplifting incident, and relied on another eyewitness, co-defendant Basfield, in providing the police with details regarding the shoplifting suspects and their vehicles (Complaint, ¶¶ 34-35); and (3) when asked to identify Plaintiffs in a line-up, Soto (and through her VSS) informed the police Plaintiffs were not the suspects, which resulted in Plaintiffs' immediate release (Complaint, ¶ 34). The only allegation of racial profiling was directed at Basfield, with no cooperation or conspiracy by Defendants. (Complaint, ¶ 36). In summary, Plaintiffs have not alleged that Defendants committed any acts or threats of violence or intimidation against them (on account of their race or otherwise), nor have they alleged (nor can they allege, consistent with the allegations in their own Complaint), that Defendants "aided in," "incited," or "conspired" with anyone to intentionally violate the Ralph Civil Rights Act on account of Plaintiffs' race since Defendants exonerated Plaintiffs during a line-up. For these reasons, Plaintiffs' Twelfth Cause of Action should be dismissed with prejudice.

F. The Absolute Privilege Provided by California Civil Code § 47(b) Bars Plaintiffs' Common Law Tort Claims for Intentional Infliction of Emotional Distress, Negligence/Negligence Per Se, and Invasion of Privacy.

As set forth in Defendants' moving papers, California Civil Code § 47(b) ("§ 47(b)") bars a civil action for damages based on statements made in any judicial proceeding, and bars all tort causes of action based on them except a cause of action for malicious prosecution. *See, generally,* Motion, 16:23-17:13; *Hagberg v. California Federal Bank*, 32 Cal.4th 350, 364 (2004). "Section 47 gives all persons the right to report crimes to the police, the local prosecutor or an appropriate regulatory agency, even if the report is made in bad faith." *Hagberg*, 32 Cal.4th at 365.

> [A] communication concerning possible wrongdoing, made to an official governmental agency such as a local police department, and which communication is designed to prompt action by that entity is as much a part of an "official proceeding" as a communication made

> after an official investigation is commenced . . . After all, [t]he policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility it is to investigate and remedy wrongdoing. . . . The importance of providing to citizens free and open access to governmental agencies for the reporting of suspected criminal activity outweighs the occasional harm that might befall a defamed individual. Thus, the absolute privilege is essential.

Id. at 364-65 (internal citations omitted). Tort claims predicated upon reports made to the police are therefore barred by the absolute privilege of § 47(b). *Id.*

The facts in *Hagberg* have striking similarity to the facts presented here. In *Hagberg*, a bank customer filed a complaint against a bank for falsely reporting to the police that she had attempted to cash a forged/counterfeit check. 32 Cal.4th at 355. Hagberg had originally presented a check to be cashed at defendant bank. The bank initially had suspicions the check was fraudulent, contacted the issuing bank to investigate, and thereafter called the police for assistance with arresting plaintiff. Shortly thereafter, the issuing bank notified defendant that the check was valid and defendant tried to notify the police of the mistake. The police, however, had proceeded to detain plaintiff, patted her down, handcuffed her, and searched her handbag. *Id.* at 355-56. Like the Plaintiffs here, Hagberg filed a complaint alleging various causes of action for race discrimination under the Unruh Civil Rights Act (§§ 51, 52.1), false arrest and false imprisonment, slander, invasion of privacy, intentional infliction of emotional distress, and negligence. *Id.* at 357. Like the Plaintiffs here, Hagberg alleged no facts that her alleged mistreatment was the result of racial discrimination other than her apparent ethnicity. *Id.* The California Supreme Court held that the absolute privilege afforded by § 47(b), particularly with respect to statements made by a citizen who contacts the police to report suspected criminal activity, bars all tort claims save those for malicious prosecution or if the utterance itself encompasses the elements for a criminal offense. *Id.* at 361, 374 ("section 47(b) . . . applies not only to defamation, . . . but to all tort actions that seek to impose liability based upon a covered communication . . . the privilege cannot be defeated by providing a new label for the alleged wrong.").

Plaintiffs here have alleged nothing more than Soto calling the police to report a crime that had occurred at the VSS store at the Bay Street Mall and providing the police with descriptions of

the suspects and, based on another eyewitness account, a license plate number of the suspect's vehicle. Defendants' purely communicative conduct falls squarely within the absolute privilege of § 47(b) and therefore mandates dismissal of Plaintiffs' common law tort claims for intentional infliction of emotional distress, negligence, and invasion of privacy, as discussed more fully below.

1. Plaintiffs' Eighth Cause of Action for Intentional Infliction of Emotional Distress Should Be Dismissed.

When a plaintiff attempts to state a claim for intentional infliction of emotional distress, "whether treated as an element of the *prima facie* case or as a matter of defense, it must also appear that the defendants' conduct was unprivileged." *Cervantez v. J.C.Penney Co.*, 24 Cal.3d 579, 593 (1979), citations omitted. Where the communication giving rise to the tort is privileged as a matter of law, the claim necessarily fails.

In *Fenters*, plaintiff, like the Plaintiffs here, sued defendants for a variety of claims arising out of her false arrest, detention, and criminal prosecution without probable cause for claims of embezzlement from which she was acquitted. 2006 WL 2016536 at *1-2. Fenters sued the forensic accountants and the district attorney's office for, among a variety of claims, intentional infliction of emotional distress. The *Fenters* court ruled that, because defendants' actions were subject to immunity conferred by § 47(b), plaintiffs' claim for intentional infliction of emotional distress is dismissed absent some further showing that "amplify extreme and outrageous conduct." *Id.* at *20; *see also Williams v. Taylor*, 129 Cal.App.3d 745, 753-54 (1982) (claim for intentional infliction of emotional distress based on employer's complaint to police of suspected theft by employee who was ultimately acquitted dismissed as barred by § 47(b)); *Kilgore v. Younger*, 30 Cal.3d 770, 777 (1982) (claim for intentional infliction of emotional distress based on alleged accusation that plaintiff was involved in organized crime as listed in media's republication of Attorney General's report dismissed as barred by § 47(b)); *Fremont Comp. Ins. Co. v. Superior Court*, 44 Cal.App.4th 867, 872-75 (1996) (claim for intentional infliction of emotional distress dismissed where doctor sued workers compensation insurer alleging bad faith in reporting him to district attorney and Department of Insurance for workers compensation fraud because reports absolutely privileged under § 47(b) even if report of crime was made in bad faith).

Additionally, the allegations against Defendants simply do not rise to the level of "extreme and outrageous" conduct necessary for the maintenance of this claim. "Normally the test of extreme and outrageous conduct is an objective one – would the conduct involved outrage the 'average member of the community'?" *Katsaris v. Cook*, 180 Cal.App.3d 256, 267 (1986). As alleged, Plaintiffs contend that Soto made a report to the police of a theft based in part on another eyewitness account identifying the vehicle used by the suspects. When asked to participate in a line-up to identify the detained suspects, Soto immediately exonerated Plaintiffs of any wrongdoing, whereupon Plaintiffs were promptly released. Plaintiffs have not, and cannot allege facts showing Defendants intended to injure Plaintiffs or acted with reckless disregard they would suffer emotional distress. Based on these allegations, the facts, as a matter of law, do not satisfy the requirement that Defendants' conduct was "so extreme as to exceed all bounds of decency and which is to be regarded as 'atrocious, and utterly intolerable in a civilized community.'" *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal.3d 493, 499 fn. 5 (1970). For all of these reasons, Plaintiffs' claim for intentional infliction of emotional distress should be dismissed with prejudice.

2. Plaintiffs' Thirteenth Cause of Action for Negligence and Negligence Per Se Should Be Dismissed.

The plaintiff in *Fenters* also sued defendants for negligence in failing in their duty to engage in "reasonable reporting of suspected crimes" and "avoiding false reports of crimes." *Id.* at *19. The district court noted that § 47(b) extended an absolute privilege to the reporting of criminal conduct and therefore dismissed plaintiff's negligence claim as well. *Id.* Plaintiffs here have similarly alleged that Defendants failed to engage in a "reasonable reporting of suspected crimes" and "avoiding false reports of crimes" by, *inter alia*, relying on the "speculative report" of co-defendant Basfield, and not attempting to apprehend the true suspects while they were inside the VSS store. (Opp., 13:7-23). Plaintiffs' theory for recovery based on negligence under these circumstances has been soundly rejected by the California Supreme Court in *Hagberg* and federal cases interpreting California law like *Fenters*.

Since Plaintiffs cannot properly allege the facts to sustain a claim for violation of California Civil Code § 52.1 (*see* Section II(D), *supra*), no "underlying" violation of either

California Civil Code Section §§ 43 or 52.1 can properly support a negligence per se claim since Defendants did not engage in any acts or threats, intimidation, coercion or violence against Plaintiffs. Because Defendants allegedly did not know Plaintiffs and did not take any actions directed at Plaintiffs that violated the Bane Act or California Civil Code § 43, Plaintiffs are not the "class of persons" the statute was meant to protect since the Bane Act was enacted to stem a tide of hate crimes and acts/threats of intimidation or coercion against individuals – none of which were committed by Defendants here. Plaintiffs have not identified any legal duty owed to them which Defendants breached. Moreover, Plaintiffs acknowledge that negligence requires proximate causation. (Opp., 11:27-12:1). Where Plaintiffs' Complaint specifically alleges that someone other than Defendants provided the allegedly false license plate number that was ultimately given to the police, the proximate cause of Plaintiffs' injury cannot be Defendants. For all of the foregoing reasons, Plaintiffs' claim for negligence and negligence per se should be dismissed.

3. Plaintiffs' Ninth Cause of Action for Invasion of Privacy Should Be Dismissed.

Plaintiffs' claim for invasion of privacy must suffer the same fate as Hagberg's claim for invasion of privacy based on an allegedly false report to the police that resulted in her detention, search and arrest for a crime she did not commit. *See Hagberg,* 32 Cal.4th at 357, 374-75. The California Supreme Court ruled in *Hagberg* that all tort causes of action (except malicious prosecution and a statutory exception not relevant here) based on absolutely privileged communications protected by § 47(b) are barred, regardless of their title. *Id.* at 374. "[A] privilege cannot be defeated by providing a new label for the alleged wrong." *Id.* Similarly here, Plaintiffs have alleged no facts supporting their invasion of privacy claim that are distinct from their alleged wrongful detention and arrest by the Emeryville Police Department based on an alleged false police report given by Soto.[6] (Opp., 10:3-12). All of the events described in the complaint took place in a public mall or on a public street. Plaintiffs failed to assert conduct by Defendants that created a serious invasion of a legally protected privacy interest. Since the complained-of conduct is barred

[6] While Plaintiffs have cited *Noble v. Sears Roebuck & Co.*, 33 Cal.App.3d 654, 660 (1973) for the proposition that an "unreasonably intrusive investigation" may violate a plaintiff's right to privacy, there are no facts in this case supporting liability based on the actions of a private investigator hired by one of the defendants.

by § 47(b), Plaintiffs' invasion of privacy claim should be dismissed as a matter of law.

III. CONCLUSION

Federal Rule of Civil Procedure 12(b)(6) permits a case to be dismissed where the complaint fails "to state a claim upon which relief can be granted." Defendants' "lengthy" analysis of the facts and law challenging the nine causes of action asserted against them does not somehow make the Complaint viable. (*See* Opp., 1:19-22). Defendants' Motion shows that, while Plaintiffs' detention and arrest were regrettable, Defendants Soto and VSS have not engaged in conduct that is cognizable under any legal theory entitling Plaintiffs to relief. *See Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984) (dismissal under Rule 12(b)(6) appropriate where complaint lacks cognizable legal theory or presents cognizable legal theory yet fails to plead essential facts under the theory). Moreover, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock, Inc.*349 F.3d 1191, 1200 (9th Cir. 2003). Immunities and other affirmative defenses may be upheld on a motion to dismiss when they are established on the face of the complaint. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999); *Jablon v. Dean Witter Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

Plaintiffs concede that their claim for slander per se should be dismissed. Plaintiffs also concede that Defendants are not state actors and they therefore cannot assert the California Tort Claims Act against Defendants. Nor have Defendants engaged in any alleged "joint action" with any government actor that would subject them to liability under § 1983. Defendants have not engaged in any acts or threats, intimidation, coercion or violence against Plaintiffs, much less on account of Plaintiffs' race since Defendants did not know Plaintiffs. Finally, all of Plaintiffs' common law claims (for intentional infliction of emotional distress, invasion of privacy, and negligence/negligence per se) lack the necessary facts and legal elements substantiating those claims and are, moreover, barred by the absolute privilege under California Civil Code § 47(b)(3). For all of these reasons, Defendants Soto and VSS respectfully request that this Court grant their Motion in its entirety, without leave to amend. In the event leave to amend is granted, Defendants request that Plaintiffs be ordered to provide a more definite statement providing the facts necessary to substantiate their claims against Defendants.

Dated: June 4, 2008

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